No. 729

Office-Supreme Co
FILE
MAY 8 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CAULDWELL-WINGATE COMPANY and POIRIER & McLANE, CORPORATION,

Petitioners, Defendants Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent, Plaintiff Below,

PORT CHESTER ELECTRICAL CONSTRUCTION COMPANY,

Respondent, Defendant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WARNER PYNE,
HERBERT S. GREENBERG,
Attorneys for Petitioners.

MONROE J. CAHN,
Of Counsel.

INDEX

PAGE

Petition:

The Decisions Below 2

Statement of the Matter Involved 2

Brief:

POINT I—The decision of the Court of Appeals deprived petitioners of their constitutional right to a jury trial 9

POINT II—The Court of Appeals exceeded its jurisdiction in affirming the judgment on a theory different from that upon which it was submitted to the jury 18

POINT III—The Complaint should have been dismissed for failure of proof 20

POINT IV—Under applicable local law, defendants were not liable because the danger was open and obvious 21

Appendix:

Excerpts of testimony of Richard John Davies 1

CASES CITED

Ahbol v. Harden Contr. Co., 241 App. Div. 764, 270 Supp. 515, aff'd 265 N. Y. 564 16

Anderson v. Federal C. Corp. (8 Cir.), 156 Fed. 2d 146 19

Baker v. Kaiser, 126 Fed. 317, 319 19

Baylis v. Travelers' Ins. Co., 113 U. S. 316, 320 and 321 18

Bordonaro Theatres v. Paramount Pictures, 2 Cir., 176 F. 2d 594 17

City of New York v. Penn Steel Co. (C. C. A. 2), 206 Fed. 454 22

PAGE

Camardo v. N. Y. State Railways, 247 N. Y. 111, 118.. 17
Campo v. Scofield, 301 N. Y. 468 .....7, 21, 22

Dimick v. Schiedt, 293 U. S. 474, 486 17

Foley v. State, 294 N. Y. 275, 280 17
Ford v. Sturgis (C. C. A., D. C.), 14 Fed. 2d 253 22
F. W. Woolworth Co. v. Carriker, et al., 8 Cir., 107 F. 2d 689, 694 18

Hardie v. Boland, 205 N. Y. 336 10
Herman v. City of Buffalo, 214 N. Y. 316, 320 16
Hodges v. Easton, 106 U. S. 408, 410, 411 and 412 18
Hormel v. Helvering, 312 U. S. 552 12
Hormel v. Helvering, 312 U. S. 552, 556 19

Imbrey v. Prudential Ins. Co., 286 N. Y. 434 18

Jacob v. New York City, 315 U. S. 752, 757, 758 17

Louisville & N. R. Co. v. Botts, 8 Cir., 173 F. 2d 164, 166 17
Lowinthan v. LeVine, 299 N. Y. 372, 378 18

McCaughn v. R. E. L. & T. Co., 297 U. S. 606, 608 19
Moore v. Charles T. Wills, Inc., 250 N. Y. 426, 428 ... 16

Rizzo v. Murray, 256 App. Div. 956, 10 Supp. 2d 92, aff'd 282 N. Y. 670 16
Ryan v. Feeney & Sheehan Building Co., 239 N. Y. 43 10

S. E. C. v. Chenery Corp., 318 U. S. 80 19
Staneck v. Cole, 7 Cir., 178 F. 2d 122, 125 17
Steuber v. Admiral Corp., 7 Cir., 171 F. 2d 777, 779 ... 17

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35 ... 17

World F. & M. J. Co. v. Carolina M. D. Co. (8 Cir.), 169 Fed. 2d 826, 829 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CAULDWELL-WINGATE COMPANY and POIRIER & McLANE, CORPORATION,

Petitioners, Defendants Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent, Plaintiff Below,

PORT CHESTER ELECTRICAL CONSTRUCTION COMPANY,

Respondent, Defendant Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, corporations organized under the laws of the State of New York, pray this court for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a decision of said court, dated the 14th day of March, 1951, which affirmed as against petitioners, and reversed and ordered

a new trial in respect of respondent, Port Chester Electrical Construction Corporation, a judgment of the United States District Court for the Southern District of New York, entered upon the verdict of a jury in plaintiff's favor in the sum of Ninety Thousand ($90,000) Dollars.

The Decisions Below

There have been two trials. Upon the first trial, plaintiff was non-suited at the end of plaintiff's case. Upon appeal, the Court of Appeals reversed and ordered a new trial (176 Fed. 2d, 237).

The opinion of the Court of Appeals on the appeal here involved (R., 619a) has not yet been reported.

Petitioner's petition for rehearing (R., 631a) was denied by the Court of Appeals on April 2nd, 1951.

Statement of the Matter Involved

The jurisdiction of this court is invoked under section 240-a of the Judicial Code, as amended, and rule 38 of this court.

This action was brought by respondent, Mary E. Person, as Administratrix of the Goods, Chattels, and Credits of William S. Person, deceased, hereinafter referred to as plaintiff, against the petitioners, ar respondent, Port Chester Electrical Construction Company, hereinafter referred to as the sub-contractor, to recover damages for the wrongful death of plaintiff's intestate, alleged to have been caused by defendants' negligence.

The case is an unusual one. It is unusual in the facts upon which the plaintiff sought to charge defendants with liability. It is unusual in that the trial judge submitted the case to the jury upon a single but erroneous theory,

which theory had been laid down by the Court of Appeals on the prior appeal. It is even a more unusual in that the Court of Appeals, while recognizing upon the appeal below that the theory of submission was erroneous and, therefore, reversed as to the sub-contractor, nevertheless affirmed as to petitioners upon an assumption of fact, which was not proved upon the trial. Upon this non-existent fact was based a theory not urged upon the trial nor submitted to the jury by the trial judge, and this deprived petitioners of their constitutional right to have a jury pass upon the question of fact upon which the affirmance was based. Moreover, the effect of the decision below has been to make petitioners wholly liable for the acts of their sub-contractor and at the same time to deprive petitioners of their remedies of indemnity and contribution from the sub-contractor which, having done the work which was claimed to have caused the death, was primarily responsible for the work.

These extraordinary circumstances appear from the facts recited below and the brief submitted herewith.

Petitioners were the general contractors under a contract with the United States Army Engineers for the construction of Camp Shanks in Rockland County, New York, between October 1942, and about August 1st, 1943 when the work was finally accepted by the Army (R., 92a). The sub-contractor had the sub-contract from petitioners for the installation of the outdoor, overhead electrical system, completing its work on May 15th, 1943 (R., 150).

After 1943, none of the defendants had anything whatever to do with the camp or its maintenance (R., 92a, 292a). The camp was used and maintained by the Army as a staging area for departing troops until August, 1946 when it was turned over to the Federal Housing Administration to provide homes for returning veterans (R., 242a).

Plaintiff's intestate was an electrical linesman, employed by James E. Smith Company, an electrical contracting firm (R., 16a-17a).

On August 6th, 1946, more than three (3) years after defendants had finished their work, in connection with performing electrical construction work required to make the camp ready for residence purposes, he was engaged in tapping in a 110 volt line from wires attached to street pole 1422 (R., 18a). For this purpose he had climbed the pole, and was electrocuted, apparently as the result of grasping the upper part of a guy wire which, allegedly, had become energized in consequence of improper contact between a "jumper" wire, connecting the high tension wires meeting at the pole, the jumper being carried around the pole, and the strain plate fastened on the pole to which the guy wire was attached (R., 19a).

Plaintiff's claim of negligence was that the proximity of the jumper to the strain plate was dangerous and should have been guarded against by carrying the jumper through a pin inserted on the top of the pole. Such a pin is known as a pole top pin.

Defendants established that Army engineers, who, under the main contract (R., 174a), had full and complete control of the work had expressly directed that no pole top pin be used (R., 190a, 194a, 197a, 199a, 201a, 205a, 220a, 233a). Accordingly, defendants claimed that, having followed the directions of the Army, they were absolved from liability unless the defect and its dangers (both of which were denied) were so patent to them as ordinary, prudent contractors that they should have refused to obey the orders.

The trial judge refused to accept the defendants' theory but, in obedience to the prior opinion of the Court of Appeals, submitted the case on a charge that if the installation was patently dangerous to *electrical engineers,* defendants were liable.

It is to be particularly noted that no question of fact as to defendants' acting as, or using, electrical engineers

on the job was submitted to the jury as a necessary, preliminary condition to liability. The rule laid down was absolute, irrespective of what services defendants used or what skill, knowledge or experience they had or did not have.

In its opinion below, the Court of Appeals acknowledged that the charge was erroneous, and that, under applicable local law, ordinarily, defendants could be held only to the standard of skill of an ordinary, prudent contractor. The court, therefore, held that since the record disclosed no proof that the sub-contractor employed an electrical engineer, as to it the charge was erroneous and ordered a new trial. But as to petitioners, the court below seized upon a casual statement of an employee, one Davies, to the effect that at the time of the trial, seven (7) years after his employment by petitioners, he regarded himself as an "electrical construction engineer". Upon this testimony, the court below concluded that at the time of the installation, seven years before, the employee was "an electrical engineer" and upon this unwarranted assumption thrust absolute and exclusive responsibility upon the petitioners for the work performed by their absolved sub-contractor, though neither this theory of liability or the fine distinction thereunder was ever presented or suggested to the jury.

This ruling brought into the case, the new, hitherto unsuggested contention that petitioners had employed an electrical engineer to supervise the work. No such contention was made by plaintiff during the trial nor was it suggested by the trial judge in his charge. The novelty of the suggestion is apparent from the fact that most of the testimony bearing upon the question, and upon which the finding was evidently based is not contained in the printed record. It has, therefore, been necessary to supply it to this court by way of an appendix hereto.

In their petition for rehearing (R., 631a), petitioners pointed out to the Court of Appeals that the said issue had not been litigated; that petitioners vigorously deny that they employed an electrical engineer to supervise the work; and that the absolute assumption of fact by the Court of Appeals was in excess of that court's jurisdiction; and, further, that, at the worst from petitioner's standpoint, a question of fact was involved which petitioners were constitutionally entitled to have submitted to a jury.

A further question is presented, that plaintiff failed to make out a *prima facie* case.

Though the method of attaching the jumper was the foundation of plaintiff's case, the evidence established that the jumper which allegedly caused the accident had not been installed by the sub-contractor.

Upon this point, the Court of Appeals said (R., 620a):

> "Upon this trial the defendants proved that the jumper which connected the two high tension wires, when it was originally installed, was not itself a separate piece of wire, as the evidence on the first trial showed, but was the continuation of one of the high tension wires, which, after passing through the clevis of one insulator bell, had been twisted on itself, and the free end carried around the pole, six to ten inches away from it, and made fast to the other high tension wire by a Burndy connector. In short, the original jumper had not been a separate wire, but the end of one of the high tension wires. The jury was justified in inferring from this substitution that the high tension wire, of which the jumper was formed, had sagged between the poles and had been pulled taut; and that the end had been cut off and a new jumper substituted, fastened at each end by a Burndy connector."

In view of the proof that the jumper installed by defendants was not on the pole at the time of the accident, there was a plain failure of proof by plaintiff, entitling defendants to a dismissal and certiorari is requested on that ground.

A further question is that the decision below is in conflict with controlling New York law on the issue of liability. Upon the first appeal, the Court of Appeals held that defendants could be liable for defects in the installation, despite the fact that they had turned it over to the Army more than three (3) years before, because it was an "inherently dangerous" instrumentality.

Since the trial but before the appeal below, in *Campo* v. *Scofield,* 301 N. Y. 468, the New York Court of Appeals decided that the doctrine of dangerous instrumentality is not applicable where the danger is open and obvious but only where it is hidden. Accordingly, the doctrine is not applicable at bar because the danger from the jumper, if, in fact, it was defective, particularly to an experienced linesman, such as plaintiff's intestate, was open and obvious.

Questions Presented

Accordingly, petitioners respectfully submit that the following questions should be reviewed by this court:

1. Did the decision of the Court of Appeals deprive petitioners of their constitutional right to a trial by jury under the Seventh Amendment to the Constitution?

2. Was the decision of the Court of Appeals beyond the jurisdiction of that court in that the court based its decision upon a finding of fact made by that court upon equivocal evidence and upon a theory not previously an issue in the case?

3. Should the complaint have been dismissed for failure of proof, it appearing that the jumper which caused the death of plaintiff's intestate was not the jumper installed by the sub-contractor?

4. Should the complaint have been dismissed because the danger from the jumper was open and obvious, and, therefore, under New York law, liability did not survive against petitioners three years after they had turned the camp over to the Army, which ever since had maintained it.

Petitioners respectfully submit that the foregoing questions involve important questions of federal law which the Court of Appeals had decided in conflict with applicable decisions of this court, and which are a departure from the accepted and usual course of judicial proceedings; and important questions of local law which the Court of Appeals has decided in conflict with applicable local decisions.

Accordingly, review on Writ of Certiorari is respectfully requested.

Dated: New York, May 3d, 1951.

Respectfully submitted,

WARNER PYNE,
HERBERT S. GREENBERG,
Attorneys for Petitioners.

MONROE J. CAHN,
Of Counsel.

PETITIONER'S BRIEF

We present the merits of the proposed questions *seriatim.*

POINT I

The decision of the Court of Appeals deprived petitioners of their constitutional right to a jury trial.

The single theory of liability upon which the case was sent to the jury was thus phrased by the trial judge (R., 324a):

> "* * * If you find that competent electrical engineers would have considered the method by which the jumper was attached to the pole by the defendants to have been not the safest rigging, you then must determine whether such engineers would have appraised the installation as being so patently dangerous as to be deemed improper.
>
> "* * * Would competent electrical engineers have anticipated that the jumper thus installed might have touched the strain plate and would they have anticipated that a linesman climbing the pole might have touched the guy wire thus energized? If you conclude that they would then you have patent danger. If you decide that competent electrical engineers would have foreseen these contingencies, then you must answer the question 'were the defendants negligent?' in the affirmative, notwithstanding that you may find that the defendants installed the jumper in that manner pursuant to the directions of the Army engineers."

The court's charge that the standard of test was the judgment of "competent electrical engineers" followed

the ruling by the Court of Appeals that such was the applicable test, upon the prior appeal (176 Fed. 2d 241):

> "Finally, the defendants argue that, since the work was done according to the plans and specifications of the War Department they may not be held liable provided they did the work as therein prescribed.* That is an issue on which we shall not pass now. It was a defence which the defendants had the burden of proving; the negative was no part of the plaintiff's case, and indeed the plans and specifications were not even put in evidence. If they had been, the defendants would have been obliged, not only to satisfy the jury that they required the rigging at 'Pole 1422' to be as it was, but that the specifications were not so patently dangerous that the competent electrical engineers would have thought them improper. These issues will be open on the new trial."
>
> **Hardie* v. *Boland,* 205 N. Y. 336;
> *Ryan* v. *Feeney & Sheehan Building Co.,* 239 N. Y. 43.

It is to be particularly noted that both in the above opinion and the charge that followed it the test of what "competent electrical engineers" would have anticipated and foreseen was laid down as an absolute, unqualified rule without regard to whether or not defendants in fact employed any electrical engineer on the job.

Upon the appeal below, the Court of Appeals acknowledged (R., 625a) that the charge did not accord with New York law as established by the two New York cases cited in its prior opinion, and, in consequence, reversed and ordered a new trial as to the sub-contractor.

However, as to petitioners, the judgment was affirmed on the ground (R., 626a) that as to them the charge was correct because petitioners had in fact employed an electrical engineer and therefore were properly subject to the standard of such "specialist".

(1) It is obvious that whether or not petitioners employed an electrical engineer would be a question of fact, unless such employment were conceded.

(2) It is further obvious that, if disputed, it would be necessary to submit such question of fact to a jury to satisfy petitioners' constitutional rights under the Seventh Amendment.

(3) It is further obvious that, if the fact of such employment were essential to petitioners' liability, they were entitled to reasonable notice of such issue and a full opportunity to litigate it.

Taking up the above points in their inverse order, it is clearly apparent that petitioners were given no notice of nor opportunity to litigate the issue of such employment for the simple reason that the question was never in the case until presented in the opinion below.

The case was not tried upon that theory nor was it submitted to the jury on that theory. Nor was that theory suggested in the opinion of Court of Appeals on the prior appeal.

We have already emphasized that the case was submitted on the theory that the standard of competent electrical engineers was absolute and unqualified, irrespective of whom defendants employed.

This was made clear not only by the charge itself with respect to the standard but as well by the charge that all defendants must be treated as a unit (R., 336a):

> "* * * your verdict must be against all defendants. You may not find for the plaintiff against any one or two defendants and find for the remaining defendant or defendants."

Since in the trial court, as we have shown, all defendants had been treated as a unit, it would seem that a new trial

should have been directed in favor of petitioners as well as the sub-contractor.

In distinguishing between the defendants, the Court of Appeals injected into the case, the new, previously unsuggested and wholly unlitigated theory that because petitioners had, in fact, utilized the services of an electrical engineer they were subject, under New York law, to exercise the skill of such specialist. No New York case so holding is cited by the court and we know of none.

Is it, therefore, clearly apparent that the Court of Appeals has disposed of the case upon a theory not presented in the trial court, based upon a foundation directly contrary to that adopted by the trial court.

The right to notice of, and opportunity to litigate, an issue is basic to the administration of justice.

If petitioners were subject to liability if they employed an electrical engineer, they were entitled to advance notice of that claim and the opportunity to meet it by proof.

Hormel v. *Helvering,* 312 U. S. 552, is here directly in point. Mr. Justice Black there said (p. 556):

> "Ordinarily an Appellate Court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there on issues upon which they have had no opportunity to introduce evidence."

The novelty and unexpected nature of the Court of Appeals' ruling is further manifest from the fact that much

of the testimony of Davies, whom the Court of Appeals held to be petitioners' electrical engineer, upon which, presumably (R., 626a) that finding was based, is not contained in the printed record below. Accordingly, it has become necessary for us to submit so much of it, not there printed, as bears upon this issue, as an appendix hereto.

Davies, called by plaintiff testified that, *at the time of trial,* his occupation was that of "electrical construction engineer". That testimony was given nearly seven years after he had left the contractor's employ (R., 55a-56a). Surely, this casual statement, elicited by way of introduction of the witness to the jury was not sufficient to establish absolutely, as matter of law, Davies' qualifications nearly seven (7) years before, especially since he explicity refused to say that he was even then (at the trial) an "electrical engineer" (Appendix, p. 18):

> "Q. Mr. Davies, you are an electrical engineer, is that correct? A. Electrical construction engineer. I will qualify that."

What he meant by "electrical construction engineer" did not appear; nor was there any proof of his education, training and experience prior to his employment by the contractor in 1943. It is clear, therefore, that plaintiff did not intend to establish his competence as an electrical engineer. There was even no showing that in 1943 he regarded himself as an electrical construction engineer. There was certainly no proof that he was, at any time, of the competence of Shaw (R., 150a) or Latzer (R., 273a).

His employment by the contractor for the job here involved was not as an electrical engineer but as "electrical superintendent" only (R., 55a).

There was no proof that the contractor considered him to be an electrical engineer or employed him as a specialist.

In this state of the record, we submit that there is no warrant for a finding that in 1943 Davies was an electrical engineer or the equivalent.

The reason for his employment by the contractor as electrical superintendent appears from the main contract. Under that contract, the contractor was charged with the duty of doing the work (Pl. Ex. 36, pp. 3-4):

> "* * * more specifically described in designs, drawings and specifications prepared for the same project by Tuttle, Seelye, Place and Raymond, Architect-Engineers";

and

> "in accordance with the drawings and specifications or instructions to be furnished hereafter by the contracting officer and subject in every detail to his supervision, direction and instructions."

and also (p. 5) to

> "advise and consult with the subcontractors in this project and shall direct and supervise their work subject to the provisions of Article VII; * * *"

Article VII (p. 18) provided:

> "The extent and character of the work to be done by the constructor (sic) shall be subject to the general supervision, direction, control and approval of the contracting officer to whom the constructor shall report and be responsible."

The foregoing establishes that no duty was cast upon the contractor to control or direct the work of the subcontractor, but that this was expressly reserved by the contracting officer. Nor was any duty cast upon the contractor to employ an electrical engineer.

There was, however, a duty cast upon the contractor to "direct and supervise" the work in the sense of seeing that it was executed in accordance with the Army's directions. In discharge of that obligation, the contractor necessarily employed men under Heintze, the chief engineer, in his words (R., 37a):

> "To see to it that the work was carried out in accordance with the plans and specifications and to see to it that the work of the subcontractors kept pace with the general construction."

For this purpose Davies was employed in connection with the electrical work.

He expressly disclaimed that it was his function to instruct the sub-contractor as to how the work was to be done or to inspect work for construction defects other than to see to it that the work generally conformed to the plans, specifications and directions of the Army (Appendix, pp. 13, 15).

There was no evidence that the work done by Davies required the knowledge, training or experience of an electrical engineer. Nor was there any evidence that his work could not have been done by one no more highly qualified than a competent electrical contractor, such as the subcontractor professed to be.

There was no proof or offer of testimony to show that Davies had any direct participation in the specific construction at Pole No. 1422 or that he was even aware of the Army's direction to omit a pole top pin.

There was no evidence that the extent of the supervision exercised by Davies was more extensive than was normally and properly exercised by a general contractor obligated to see to it that its sub-contractors expeditiously, properly and sufficiently performed their sub-contracts.

Thus, Davies testified that at the outset it was his duty "primarily to see to it that all the various trades * * * were provided with temporary lighting" (Appendix, pp. 8, 22); and that he was instructed "to blaze a trial for the Port Chester Electric Company * * * we were in virgin territory. It was virgin area, trees, no woods; I had surveyors under my supervision; and we staked out the pole line for the contractor" (Appendix, pp. 1-5).

He denied that it was his function to make detailed inspections of Port Chester's work (Appendix, pp. 11-12, 13, 16, 17-18, 24-25); according to him, that was the Army's function, the Army preparing "punch lists" specifying defects (Appendix, pp. 12-13, 21); his inspections were "casual", "to see to it the work was progressing in a very satisfactory manner" (Appendix, p. 15).

We respectfully submit that the sum total of Davies' testimony warranted no inference other than that he was discharging the right and obligation of the contractors to see to it that the sub-contractor was fulfilling its ultimate obligation. It is well settled under New York law that such supervision does not render the contractor liable for the sub-contractor's negligence.

Herman v. *City of Buffalo,* 214 N. Y. 316, 320;
Moore v. *Charles T. Wills, Inc.,* 250 N. Y. 426, 428;
Ahbol v. *Harden Contr. Co.,* 241 App. Div. 764, 270 Supp. 515, aff'd 265 N. Y. 564;
Rizzo v. *Murray,* 256 App. Div. 956, 10 Supp. 2d 92, aff'd 282 N. Y. 670.

In the *Herman* case, *supra,* the court said (p. 320):

> "* * * The fact that the owner through an architect and superintendent of construction or other agent exercises a general supervision of the work and construction does not affect the rule of exemption from liability, where that is only for the purpose of assur-

ance that the contract is being performed (Uppington v. City of New York, 165 N. Y. 222)."

But assuming, arguendo, that Davies' testimony may have warranted inferences that he did exercise control over the sub-contractor's work, or that he was so skilled a specialist that the contractors were thereby charged with the knowledge of such specialist, they were certainly not inferences which the testimony compelled to be drawn as matter of law, but were merely possible inferences, the choice of which was the function of the jury.

It is where only one inference may possibly be drawn that the court is authorized to withdraw determination thereof from the jury.

Bordonaro Theatres v. *Paramount Pictures,* 2 Cir. 176 F. 2d 594;
Staneck v. *Cole,* 7 Cir., 178 F. 2d 122, 125;
Louisville & N. R. Co. v. *Botts,* 8 Cir., 173 F. 2d 164, 166;
Stueber v. *Admiral Corp.,* 7 Cir., 171 F. 2d 777, 779;
Cf. Camardo v. *N. Y. State Railways,* 247 N. Y. 111, 118;
Foley v. *State,* 294 N. Y. 275, 280.

Since, therefore, the inferences to be drawn from Davies' testimony, both as to his qualifications and his function were, at most, permissive only, and hence, questions of fact, petitioners have been deprived of their constitutional right to a jury trial.

Tennant v. *Peoria & P. U. Ry. Co.,* 321 U. S. 29, 35;
Jacob v. *New York City,* 315 U. S. 752, 752, 757, 758;
Dimick v. *Schiedt,* 293 U. S. 474, 486;

Baylis v. *Travelers' Ins. Co.*, 113 U. S. 316, 320 and 321;
Hodges v. *Easton*, 106 U. S. 408, 410, 411 and 412;
F. W. Woolworth Co. v. *Carriker, et al.*, 8 Cir., 107 F. 2d 689, 694;
Cf. Imbrey v. *Prudential Ins. Co.*, 286 N. Y. 434;
Lowinthan v. *LeVine*, 299 N. Y. 372, 378.

It cannot be said that petitioners waived that right since the question was never in the case until presented by the opinion of the Court of Appeals.

It was not presented in the trial court, because, as we have shown, the trial judge did not submit the case to the jury on the basis that liability was dependent on the actual employment of an electrical engineer by defendants or any of them but on the basis that the standard of such a specialist was applicable to defendants and all of them, absolutely and in all events, as the Court of Appeals had said in its opinion on the prior appeal. Since, therefore, the fact of such employment was immaterial to the rule of liability as charged, defendants were not called upon to raise the question in the trial court.

Immediately after the question was brought into the case by the opinion below, petitioners promptly raised the constitutional point by their petition for rehearing (R., 637a).

POINT II

The Court of Appeals exceeded its jurisdiction in affirming the judgment on a theory different from that upon which it was submitted to the jury.

We have shown that the trial judge submitted the case on the theory that the standard to be applied was, unqualifiedly and absolutely, the skill of competent electrical engineers, irrespective of employment of any such engineer by defendants.

We have also shown that the Court of Appeals disposed of the appeal as against petitioners not on the correctness of that submission but on the different theory that such standard was applicable to petitioners because they had, in fact, employed an electrical engineer.

In ruling as it did, we submit that the Court of Appeals exceeded its appellate function, which was limited to review of the legal basis upon which the case was disposed of in the trial court.

The fact that the jury found against defendants on the absolute standard charged by the court would not justify the inference, implicit in the Court of Appeals decision, that they would have so found if the qualified theory of the Court of Appeals had been the basis of submission.

In affirming upon the new and unlitigated theory, we think the Court of Appeals abandoned its limited appellate function and undertook the unauthorized role of a trial court.

S. E. C. v. *Chenery Corp.*, 318 U. S. 80;
Hormel v. *Helvering*, 312 U. S. 552, 556;
McCaughn v. *R. E. L. & T. Co.*, 297 U. S. 606, 608;
World F. & M. J. Co. v. *Carolina M. D. Co.* (8 Cir.), 169 Fed. 2d 826, 829;
Anderson v. *Federal C. Corp.* (8 Cir.), 156 Fed. 2d 146;
Baker v. *Kaiser*, 126 Fed. 317, 319.

An important question of appellate practice is therefore involved which should be reviewed by this court.

POINT III

The Complaint should have been dismissed for failure of proof.

We have heretofore pointed out (p. 6) that the Court of Appeals held that the evidence established that the jumper installed by the sub-contractor was not the jumper which allegedly caused the accident, but that there had been a substitution.

With regard to this, the Court of Appeals said that if the "departure from the original construction (of the jumper) added to the risk, there would be force in such an objection but there is no evidence that it did".

That such departure did add to the risk was undeniedly established by the testimony of expert Latzer in answer to questions of juror No. 10, as follows (R. 281a):

> "Juror No. 10: Is it mechanically possible for two Burndy connectors, such as installed on this pole, to become loose and cause the jumper to fall down?
>
> The Witness: Yes, it is mechanically possible if two Burndy connectors would be used, yes.
>
> Juror No. 10: Another question. It is less likely if only one Burndy connector were used and if the other end was a continuation of the main wire, then there would be less likelihood of its falling down?
>
> The Witness: Under those circumstances I can't imagine how it could fall."

So far as we are aware, this is the only testimony on the subject and affirmatively establishes that the risk was newly created or, at the very least, substantially increased.

If defendants' jumper could not have fallen, then it could not have caused the accident. Further, if it was

generally believed that it could not fall, then it was not patently dangerous because of possible contact with the strain plate, which was the sole basis upon which defendants were charged with liability.

Furthermore, there was no proof whatever that that original jumper was dangerous, because plaintiff offered no proof with regard to it. All of plaintiff's proof related to the substituted jumper consisting of a separate wire. There was no proof whatever that the continuous wire which was the original jumper was of such size or construction that even if it had dropped it could have touched the strain plate holding the guy wire.

In view of this failure of proof, and particularly in view of Latzer's testimony heretofore referred to, the complaint should have been dismissed and the verdict should have been set aside because there was no basis upon which the jury could properly have made the required finding that the original jumper was dangerous.

POINT IV

Under applicable local law, defendants were not liable because the danger was open and obvious.

On November 30th, 1950, the New York Court of Appeals in *Campo* v. *Scofield,* 301 N. Y. 468, held that the doctrine of dangerous instrumentalities, under which those responsible therefor may be held liable to remote users, has no application to such instrumentalities as are openly and obviously dangerous. The court there said that the manufacturer of a machine (p. 472):

> "* * * is under no duty to guard against injury from a patent peril or from a source manifestly dangerous."

That decision was rendered intermediate the verdict and the argument below, and was called to the attention of the Court of Appeals.

The Campo decision established, we submit, that the ruling of the Court of Appeals on the first appeal (176 Fed. 2d, 241) that defendants were subject to liability despite the fact that they had surrendered all control to the Army more than three (3) years before the accident, because of the inherent danger in the high tension wires and the jumper, was not in accord with local law.

Apparently, the Court of Appeals thought the Campo case applicable only on the question of contributory negligence for it said, in referring to that case (R., 627a):

> "There remains only the question of the decedent's contributory negligence which has two separate legal aspects."

The Campo case was not decided from the standpoint of contributory negligence. It was based on the sufficiency of the allegations of defendant's negligence. The court held that because the danger was obvious, no actionable negligence was or could be alleged.

So here, the danger from the jumper being obvious, no liability in negligence could be predicated upon it, at least as against a party not presently maintaining it, who had ceased all relation with it more than three (3) years before.

The ordinary rule is, of course, well settled that after a contractor has turned over the work to the owner and the owner assumes control, the contractor is not liable for subsequent accidents.

> *Ford* v. *Sturgis* (C. C. A., D. C.), 14 Fed. 2d 253;
> *City of New York* v. *Penn Steel Co.* (C. C. A. 2), 206 Fed. 454.

The burden was upon plaintiff to establish defendants' negligence, and she did not carry that burden under the Campo decision.

The writ of certiorari should therefore be granted.

Respectfully submitted,

WARNER PYNE,
HERBERT S. GREENBERG,
Attorneys for Petitioners.

MONROE J. CAHN,
Of Counsel.

APPENDIX

Excerpts of Testimony of Richard John Davies.

(471) RICHARD JOHN DAVIES, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. D'Agosto:

Q. Mr. Davies, where do you reside? A. Fort Lee, New Jersey.

Q. What is your occupation? A. Electrical construction engineer.

Q. Were you employed by the defendants Cauldwell-Wingate and Poirer & McLane in 1942 and 1943, at Camp (472) Shanks? A. Yes.

Q. In what capacity? A. Electrical superintendent.

Q. From when to when were you employed at Camp Shanks by the general contractors? A. In October 1942 to July 1943.

* * * * * *

By Mr. D'Agosto:

Q. When did you leave the camp, Mr. Davies, mentioning the month, the day and the year? A. July 24, 1943.

Q. Can you tell us briefly what your duties were at the camp as the employee of Cauldwell-Wingate and Poirer & (473) McLane? A. Well, I was in charge of the electrical installations for the entire camp.

Q. Now, who is your immediate superior? A. Mr. Heintze.

Q. And what, if any, instructions or orders did Mr. Heintze give you to transmit to others regarding the outside aerial electrical distribution work at Camp Shanks? A. Well, I would be instructed to—

Q. Wait, now—

Mr. Evans: I am not objecting.

Excerpts of Testimony of Richard Davies.

A. (Continuing) I would be instructed to blaze a trial for the Port Chester Electric Company.

Mr. Evans: Let us have that again.
The Witness: Blaze a trial.

Q. And by blazing a trial what do you mean? A. Well, we were in virgin territory. It was virgin area, trees, no roads; I had surveyors under my supervision; and we staked out the pole line for the contractor.

Q. And in blazing a trail who would attend to the blazing of the trail, as you call it? A. We did.

Q. By "we" who do you mean? A. I had a surveyor by the name of Warren Fay, and he had a party of two or three suveyors, and he would receive a sort of plot plan for me indicating the area to be staked out.

Q. And you directed Warren Fay to go out and blaze (474) a trail, is that right? A. Yes.
trical installations for the entire camp.

Q. Now I believe you said something about virgin territory. A. Yes.

Q. Can you tell us whether Isabel Road and Heather Lane—whether that was virgin territory? A. No.

Q. Now, that was existing territory, wasn't it? A. That is right.

* * * * * *

(475) Q. And was it you who directed Port Chester to erect the outside aerial electrical distribution system at the camp? A. Yes.

* * * * * *

By the Court:

Q. When did you first give any instructions to either Hadley or La Ganza—Stretch, as you call him—when was the first time that you recall that you gave them any in-

structions with respect to the outside aerial system? (476) A. I should say a day or two after the contract had been signed; I think that was some time in October, and I am not too sure about that.

By Mr. D'Agosto:

Q. What year was that? A. 1942.

Q. What instructions did you give Stretch or Hadley at that time? A. I don't remember. I don't remember the name of the road, if that is what you want, but they were directed to start in.

Q. But you did direct them to start in October 1942? A. Yes.

Q. Now, did you at any time thereafter give Hadley or La Ganza any instructions? A. Yes.

Q. When? A. From time to time as the areas were required or the other facilities required electrification.

Q. In other words, as each avenue required electrification you gave the orders; is that correct? A. That is right.

Q. And those orders continued until when? A. Until the completion of the camp.

Q. And from whom did you receive those orders? A. From Mr. Heintze.

Q. Now, were these orders oral or written or both? A. Both, I would say.

* * * * * *

(478) The Court: But all you were asked is what instructions did you give to La Ganza and Hadley with respect to the high tension wires on poles 1421, 1422, 1426 and 776.

(479) The Witness: I don't remember giving any instructions on the installation of the wires.

Excerpts of Testimony of Richard Davies.

By Mr. D'Agosto:

Q. Well, did you give the defendant Port Chester any instructions as to the installation of any wires located in either area 14 or area 7? A. No, sir.

Q. At no time? A. At no time throughout the camp.

Q. Whose job was it to see to it that the work schedules or the work progress schedules of Cauldwell-Wingate, Poir & McLane and Port Chester coordinated with each other? Was that your job? A. Yes.

Q. And what method did you use in determining what work had to be done the following day in so far as Port Chester was concerned so that your work and other work would coordinate with each other? A. Our work did not coordinate with others. We were requested by the Army or someone through Mr. Heintze to get this area ready, and I would pass that information on.

Q. To whom would you pass the information to get the area ready? A. It might have been through Warren Fay, the surveyor, Tom Hadley, Port Chester's man, or Stretch.

Q. Now, to your knowledge were there any plans and specifications given by Cauldwell-Wingate and Poirer & McLane to Port Chester regarding the installation of the (480) high tension wires in area 14 and 7? A. I don't know.

Q. Were there any detail plans or detail specifications? A. I don't know.

Q. Did you at any time during the year 1943 tell any representative of Port Chester in a general way to install the high tension wires in area 14 and area 7? A. No, sir.

Q. You did not? A. No; at no time.

Q. Do you remember or do you not? A. I never instructed them how to install the wires.

Excerpts of Testimony of Richard Davies.

Mr. Evans: I ask to strike that out; that is not what he was asked.

The Court: Sustained.

Q. Did you ask them or did you instruct them to install the wires? A. The information from me to Fay or to Hadley or to Stretch was that that area was ready for them; to go in and do the work.

Q. Did you at any time go out into area 14 and area 7 as one of the party for the purpose of conducting a survey? A. Yes.

Q. And who in that party was there besides yourself? A. Mr. Fay, the surveyor, and myself representing Cauldwell-Wingate—I believe Mr. Laschiver and Mr. Witzman of the Government, and Stretch, and possibly Hadley or Mr. Eisenstadt, I don't remember, representing (481) Port Chester.

Q. When you say "Stretch" do you mean Mathew La-Ganza? A. Yes.

Q. And was he an employee of Port Chester? A. Yes.

Q. And when you say "Fay" do you mean Warren Fay? A. Warren Fay.

Q. And by whom was he employed? A. Cauldwell-Wingate.

Q. What was his occupation? A. He was a surveyor.

Q. And by "Eisenstadt" whom do you mean, Maurice Eisenstadt? A. Yes.

Q. By whom was he employed? A. Port Chester Electric.

Q. Now, do you recall when this party went out on this tour at the camp? Do you remember the month? A. I think it was some time in June; I am not too sure.

The Court: What year?

Mr. D'Agosto: 1943.

Q. Do you know whether it was July of 1943? A. I don't remember.

Q. Now, what, if anything, did this group of men, including yourself, do on this tour? A. We checked the distances between poles to determine the length of wire between the two poles; to determine the hardware on each and every pole, whether it be a street light, crossarm, (482) dead-end insulator, pin insulators; all miscellaneous hardware, ground rods, grounds, transformers—all items that Port Chester were to be paid for on a unit price basis.

Q. Now, how long did this tour take? A. Offhand I don't remember.

Q. Approximately? A. Oh, several weeks; possibly a month.

Q. Now, by the way, did any member of your party have a telescope or a pair of binoculars? A. No.

Q. Are you sure of that? A. Absolutely.

Q. What else besides ascertaining the number of pieces of hardware and the number of feet of wire strung up on the pole did you or any member of your party do on this tour?

Mr. Evans: I am going to object as speaking for any other member of the party except himself.

Q. If you saw.

Mr. Evans: I object to that.
The Court: Wait a minute.

By the Court:

Q. Was there a representative of Port Chester present? A. Yes, sir.

Q. And you were the representative of Cauldwell- Wingate? A. Yes.

(483) The Court: Overruled.

Both of the defendants were represented at that survey, and I think, anything that transpired within their hearing and within their sight is admissible.

You may have your exception.

By Mr. D'Agosto:

Q. Mr. Davies, will you answer the question, please?

The Witness: What was it?

(Question read.)

A. That was all.

Q. Didn't any of you conduct an inspection of the poles? A. No, not a deliberate inspection. We actually saw the condition of the pole and the wires on the pole but it wasn't for the purpose of examination—

The Court: Objection sustained. Strike it out.

Mr. D'Agosto: The entire answer, your Honor?

The Court: "but it wasn't for the purpose." From there on.

Q. Now, did any member of your party examine the tops of these poles with a pair of binoculars or with a telescope? A. No.

Mr. Evans: So far as he saw. I am going to object to that unless it includes that.

Mr. D'Agosto: I am only asking him what he saw.

(484) By the Court:

Q. Did you see anybody in the party examine it with binoculars? A. No.

Excerpts of Testimony of Richard Davies.

Q. Did you see anybody in the party climb any of the poles? A. No, sir.

By Mr. D'Agosto:

Q. Were there any pole tops—were there any climbing inspections conducted by you or any member of your party in your presence during this tour? A. No.

Q. Now Mr. Davies, will you look at Plaintiff's Exhibit 1 and look at these four poles, 1426, 1422, 1421, and 776, and then read the legend? A. 1422 and 1421 are indicated as existing poles, and 1426 is indicated as an existing pole.

Q. How about 776? A. That was a new pole.

Q. Now, can you tell us who staked out the area in which pole 776 was to be installed? A. Warren Fay.

Q. Who was Warren Fay employed by? A. Cauldwell-Wingate.

Q. And who installed pole 776? A. Port Chester Electric.

Mr. D'Agosto: Your witness.

Cross Examination by Mr. Mansdorf:

Q. Mr. Davies, you stated just now, a moment ago, that you gave instructions to Mr. Hadley, is that right? (485) A. That is right.

Q. Do you remember whether you gave any instructions to Mr. Hadley pertaining to pole 1422 at the time of its installation, at the time of the installation of the wires upon it by Port Chester? A. No.

* * * * * *

Q. Now, at the start of your job, Mr. Davies, it was your duty primarily to see that all the various trades, such as carpenters, plumbers and the like, were provided with temporary lighting; is that right? A. That is right.

Excerpts of Testimony of Richard Davies.

Q. And thereafter you received plans for certain areas in which work was supposed to be done, is that right? A. I would say they were sketches, not plans.

Q. In the beginning there were no detail plans and no detail specifications. Let us understand one another. A. Yes.

Q. And from time to time you received detail plans (486) or sketches? A. Sketches.

Mr. D'Agosto: How about detail plans?
The Witness: No detail plans. Sketches.

Q. In other words, there were no such things as detail plans? A. There might have been but I never had them.

Q. You never had them? A. I never had them.

Q. And if there were, you would have them? A. I don't know if I would have them or not.

Q. Well, it was your job to see that the electrical construction was made in accordance with those detail plans or the plans and specifications, is that right? A. That is right.

Q. And according to the contract the National Electrical Safety Code was also included in those plans and specifications? A. Yes, I suppose so.

Q. Not you suppose so. That is the fact? A. I never had a copy of the contract or the specification. I had a general specification that applied to every Army camp in the United States.

* * * * * *

(490) Q. Now, you stated before that you blazed a trial at Camp Shanks; and you also stated that you used to receive sketches from time to time from the architect engineers, is that right? A. We probably prepared the sketches ourselves. Mr. Fay probably prepared the schedules from some sort of a preliminary drawing provided by the architect engineer.

Excerpts of Testimony of Richard Davies.

Q. By the architect engineer, who do you mean? A. Tuttle, Seeley, Place & Raymond.

Q. Tuttle, Seeley, Place & Raymond? A. Yes.

Q. And since that was virgin territory, as you stated before, a representative of Tuttle, Seeley, Place & Raymond was up there, is that right? A. I never went to visit any of the sites with any of their representatives. I never had anything to do with them at all.

Q. Well, is it not a fact that representatives of Tuttle, Seeley, Place & Raymond actually accompanied the surveyors out in the field? A. Not our surveyor. The surveyors for the prime contractors, road department, sewage, water, roadways.

Q. By "our surveyors" you mean Cauldwell-Wingate (491) surveyors, is that right? A. Yes, but not Warren Fay.

The Court: Just a minute. Let us get this straight.

By the Court:

Q. Did the prime contractors have various departments, one in charge of electricity, one in charge of roads, another in charge of sewage, another in charge of buildings? A. Yes.

Q. And those that went in with the layout of ground, such as the electrical people and the road people and the sewage people—did each department have their own surveyor? A. Yes.

Q. And Warren Fay was a surveyor with the electrical division? A. Yes.

Q. Did the representative of Tuttle, Seeley, Place & Raymond—did their representatives ever go out with any of the surveyors from the electrical division? A. No, sir; at no time.

* * * * * *

Excerpts of Testimony of Richard Davies.

(492) Q. Now, Mr. Davies, did you receive any instructions orally from a representative of the War Department? A. Through Mr. Heintze.

Q. Did you ever at any time receive directions from a representative of the War Department directly? A. No.

(493) Q. Did anybody in the War Department or the Corps of Engineers' office ever tell you what they wanted done on the high tension wire? A. No.

Q. Did anybody in the War Department tell you that they wanted something corrected, personally, orally? A. They probably had, yes.

Mr. D'Agosto: Who is "they"?

Q. Well, Mr. Laschiver? A. Mr. Laschiver and Mr. Witzman.

Q. That is correct. Did Mr. Laschiver ever tell you that he wanted certain things done on the aerial electrical distribution system? A. I don't remember of any particular cases or case.

Q. Did Mr. Witzman ever tell you that he wanted something done or something undone on the aerial electrical distribution system? A. Not that I remember. There may have been some sort of general comment or talk but nothing that they demanded or insisted be done. No direct orders, in other words.

Q. Nothing that they demanded? A. No. Orders would have to go through Mr. Heintze if they were orders.

Q. Now, is it not a fact that the instructions that you spoke about were constant inspections, is that right? Inspections going on all the time? A. Not by me or anyone in my department.

* * * * * *

(495) Q. Now, there were times that dispute occurred between yourself and the sub-contractor as to how something should be done— A. No, sir.

Excerpts of Testimony of Richard Davies.

Q. —with regard to the electrical system? A. No, sir.

Q. Were there ever any times when a dispute arose as to the method of doing something on the aerial electrical distribution system between yourself and the War Department? A. That might have been. It might have been because of some natural obstruction, a tree or a boulder or something that the Government wanted to save for camouflage purposes, we would have Mr. Laschiver's permission to divert the pole line.

Q. And if there was a difference of opinion, in such an instance the ultimate determination was made by whom? A. The War Department.

Q. So you had to take their orders? A. That is right.

* * * * * *

(496) Q. Isn't it a fact that you had three men out in the field who were checking on Port Chester's work? A. No, sir. Warren Fay wasn't qualified to check their work. He was a surveyor. He was directly under my supervision. A man by the name of Bill Leary had nothing to do with the electrical distribution. He was the inside wire inspector; he watched the work that was going on in the barracks. And the third man, Mr. Snarky, was in charge of the office, the maintenance office. He received all the calls for emergency lights and power, and what not.

* * * * * *

(501) The Witness: I did not prepare a punch list, your Honor, at the time of the survey. I had nothing to do with punch lists. The War Department or the Army prepared the punch lists. They called them missing items or (502) omissions or what might have happened to a pole to our attention.

The Court: Did you know what would be listed on the punch list at the time of the survey?

The Witness: No.

The Court: I don't mean the actual items listed. Did you know what the War Department would list on a punch list?

The Witness: No, I did not.

* * * * * *

(505) Q. So that when you examined the pole and if you found a defective condition on that pole not in accordance with the National Electrical Safety Code, it was your duty to set that forth as improper work? A. I did not inspect, make deliberate inspections. I depended on the War Department to give me this punch list.

Q. But you were present at these inspections, is that correct? A. No, not during inspections. Only at the survey.

Q. You were present at the survey? A. Right.

Q. Did you at any time take issue with the War Department and advise them that their contention that something was defectively constructed was not correct? A. I don't remember.

Q. It was your job to see that this electrical installation was made properly, is that right? A. And acceptable—

Q. And acceptable by the War Department? A. Yes.

Q. Otherwise you would not be doing your job properly, is that right? A. Yes.

Q. So that when you received this punch list that (506) required correction over here, is that right? A. Yes.

Q. There is no doubt about that? A. Yes, that is right.

Q. And when this was given by you to Port Chester something had to be done about these poles? A. Yes.

Mr. D'Agosto: What is the answer, Mr. Davies, so the stenographer can get it?

The Witness: I said yes.

Excerpts of Testimony of Richard Davies.

Q. Did you or anybody under your supervision see that this work was attended to? A. No.

Q. So as far as you know, you would tell this Court and jury that you don't know whether that was even corrected? A. It must have been, otherwise we would never receive the O.K. from Mr. Laschiver, and Colonel Musgrove made the final inspection.

Q. Who? A. Colonel Musgrove.

Q. It must have been corrected and accepted, is that right? A. Yes, sir.

* * * * * *

(508) By the Court:

Q. Mr. Davies, tell us, if you will, the distinction, at least as you understand it, between an inspection and a survey, and see if we understand it. A. An inspection in my opinion would be something deliberate; you would go over the thing with a fine comb. You would look to see if the bolts had so many threads; if the washers had been applied; if the insulator bore the manufacturer's name, for the specified Joslyn insulators, and all that. That would be a thorough inspection, your Honor. But a survey, we knew there were so many feet of wire after determining the distance between the poles; we knew there were so many crossarms, transformers, street lights, guys, and so forth. That was part of the survey.

Q. In the respect of the time element in the performance of the work, is there any distinction in your mind between inspection and survey? Do I make myself clear? A. No, you don't.

(509) Q. Well, the work progressed. A. Yes, sir.

Q. Certain observances—to use a general phrase to cover them all—certain observances were made during the progress of the work? A. That is right.

Excerpts of Testimony of Richard Davies.

Q. Certain observances was made at the conclusion of the work? A. Yes, sir.

Q. Now, is there any distinction in those observances based upon the time with respect to the progress of the work that would distinguish them either as inspections or surveys? A. General observances, your Honor, they were very casual. By "general", casual, drive through the areas, if it would be possible to drive through the areas, to see if the work was progressing in a very satisfactory manner.

Q. No, you don't understand my question. I believe you testified that sometimes you alone or sometimes you were accompanied by a representative of the War Department, or sometimes you were accompanied by a representative of Port Chester, went out in the field and observed the work during progress? A. That is right.

Q. Were those observances during the progress of the work inspections or surveys, or both? A. Inspections. They were inspections.

Q. They were inspections? A. Yes, sir.

Q. Now, when the whole job was finished a party (510) made up of a representative of Cauldwell, a representative of the War Department, one or more representatives of each, and a representative or more of Port Chester went out and observed the entire job, is that correct? A. That is correct.

Q. Was that observance an inspection or a survey? A. That was a survey.

Q. That was a survey? A. Yes.

Q. Am I to understand, therefore, that the distinction you mean to imply in your testimony between an inspection and a survey is that an inspection was made during progress and a survey was made at the end of the entire job? A. Yes, sir.

The Court: That is what I wanted to get clear in the record.

Excerpts of Testimony of Richard Davies.

By Mr. Mansdorf:

Q. Mr. Davies, is it not a fact that when you inspected this pole you inspected as to the manner in which the work was being done, is that right?

The Court: Which pole?
Mr. Mansdorf: 1422.

A. That was part of the survey. No inspection. Survey.

Q. I thought you stated before that the survey was merely a tally as to the number of hardware that was used? (511) A. That is right, we observed the hardware on each and every pole.

Q. So that the inspections were as to the manner of construction? A. No. You could see. I mean, it wasn't deliberate to find fault or find out if it had been installed mechanically or electrically perfect. It was part of the survey to determine the amount that—

Q. I am talking about the inspection, Mr. Davies, to see whether it was properly installed, is that right, and that is how you got your punch list? A. We got the punch list from the War Department. They made the inspections. We did not make deliberate inspections. They were casual, as I must have testified two years ago or last year, periodical inspections. They were casual inspections. You could stand on the road to see if the job looked right. You didn't have to go up every pole. You could see if the poles lined up.

* * * * * *

(513) Q. Now, I ask you to refer to Defendants' Exhibit Q and tell us whether the punch list included in that exhibit arose as a result of an inspection or as a result of a survey? A. As a result of an inspection made by

the War Department, not our department. The War Department.

Q. Did that come about as a result of the time that you and the War Department and Port Chester went out to make your final observance? A. It might have been, your Honor.

Q. You don't know? A. I don't know. We did not. I, as a representative of Cauldwell-Wingate, did not make a record of any little minor items that were apparently overlooked. We left that to the War Department to prepare that list.

* * * * * *

(516) The Court: Did you ever make any inspection?

The Witness: No, sir, not deliberate inspections. Casual inspections, yes.

* * * * * *

(518) By Mr. Mansdorf:

Q. Mr. Davies, were you asked this question and did you give this answer at the previous trial, again folio 1009:

> "Did you inspect the wires for the outside electrical distribution system? A. Yes, I made a periodical inspection."

A. That is right, but not at the time of the survey. There was a periodical inspection made by me. I would drive through the camp and I would just observe that the wires were strung and you could tell at a glance if they were not mechanically perfect.

(519) Mr. D'Agosto: Mechanically?

The Witness: Mechanically perfect.

Excerpts of Testimony of Richard Davies.

Q. Now, that survey that you talked about, so that we can dispel any doubt in the minds of the jurors—

The Court: And the Court.

Q. —and the Court, that was a combination inspection and survey, is that right? A. I suppose you would call it that. Probably the War Department made the inspection and I helped make the survey to establish the quantities.

Q. I don't want you to suppose. Was that a combination inspection and survey? A. On my part? I would say it was a survey and the other members of the party probably made the inspection because this punch list seems to substantiate my thoughts along the line that the Government made up the punch list. We did not make the punch list.

* * * * * *

(523) Cross Examination Continued by Mr. Mansdorf:

Q. Mr. Davies, you are an electrical engineer, is that correct? A. Electrical construction engineer. I will qualify that.

* * * * * *

Q. Now I show you Defendants' Exhibit A in evidence, and ask you to read the paragraph entitled "33-04. General description." A. "Contractor shall furnish all labor and materials for complete aerial electrical distribution and street lighting system throughout the area as indicated on the drawings and as covered herein. (524) All work shall be done and materials furnished, in strict accordance with these specifications and in a manner satisfactory to the Contracting Officer. The latest published regulations of the National Electric Safety Code shall be considered as included in these specifications and the applicable re-

quirements shall be fully and strictly complied with, except where otherwise specifically noted."

Q. Now, the sub-contractor erected the aerial distribution system in accordance with plans and specifications given to it, is that correct? A. As far as I know, he did.

Q. And oral instructions given to it, is that correct? A. As far as I know.

Q. And it was your job to see that the manner of the performance of their work was in accordance with the contract and the specifications, is that right? A. I suppose so.

* * * * * *

(526) Q. Now Mr. Davies, you directed the type of installations at various times on the overhead electrical distribution system, isn't that right? A. That is right.

Q. And you directed the manner of its installation too, didn't you? A. There were certain occasions, yes.

Q. There is no doubt about that? A. No doubt about it. I prepared some drawings.

Q. And you also gave instructions to the sub-contractor, is that right? A. Yes.

(527) Mr. Mansdorf: Will you mark this for identification, please.

(Marked Defendants' Exhibit X for identification).

Q. Now Mr. Davies, I show you Defendants' Exhibit X for identification and ask you if you know what that is? A. That is a one-line diagram of the camp as built.

Q. And isn't it a fact that you prepared that diagram? A. That is right.

Q. And prepared it when? May 1943? A. Evidently, yes. That is the date. That is true.

Q. And that is a product of your own hand, is that right? A. Yes.

* * * * * *

(528) Cross Examination by Mr. Evans:

Q. I have very few questions. Mr. Davies, the Army engineers were on the job all the time while this work was being done, were they not? A. Yes, sir, they were.

Q. And the head man from the engineering department that was on the job was Laschiver? A. That is right.

Q. And under him how many men did he have? A. I don't remember. I remember one man in particular, Witzman.

Q. And there were others too? A. Oh, yes, there were.

Q. All right. And Laschiver and Witzman and these others were on the job while each pole was being rigged (529) up, were they not? A. As far as I know.

Q. And they issued instructions at various times on how to do it, didn't they, at the top of each pole? I don't mean every pole, but I mean at various times. A. I don't know, honestly, Mr. Evans. I don't know if they did or not; I wasn't there; and I doubt whether they would have the authority to direct the foreman.

Mr. Evans: I ask to strike out from "doubt" on.
The Court: Strike it out.
The Witness: Sorry.
The Court: That is all right.

Q. Did they speak to you at various times as to how the work was to be done by the contractor and tell you to tell them? A. I doubt that. There might have been some discussion. But it would be more or less off the record. It would be like a little family gathering.

Q. They were supreme? A. Absolutely.

Mr. D'Agosto: Who is "they"?
Mr. Evans: The Army.
The Witness: Yes.

Excerpts of Testimony of Richard Davies.

Q. Both you and Port Chester had to do what they told you? A. Absolutely.

Q. That is correct, is it not? A. Yes.

Q. Whom did they give their instructions to if you say you did not give them direct? You doubt that you (530) gave them direct to Port Chester; is that what you started to say? A. To anyone of the Port Chester foremen in the field.

Q. Did they give them to you or did they give them to Heintze or who did they give them to? A. I didn't think it was necessary, Mr. Evans, at any time to give the men instructions. They were all qualified linemen as far as I knew.

Q. Whether you think it was necessary or not, did they at any time that you know of tell how it ought to be done, or anything of the kind, or to correct this or change that? A. I don't think there was anything of consequence—

Q. I did not ask whether there was a consequence or not. A. I don't know any particular item that they would have to correct the foreman in the field.

* * * * * *

(534) Q. Well, I think you told us in the end that it might have been an inspection on the part of the Army people, but it was a survey on your part? A. Yes, sir, it was.

Q. You mean by that that the Army engineers who inspected were looking to see that everything was properly done, whereas your interest was only to see the amount of work to be paid for, is that right? A. That is right.

Q. And the Army being the ones to satisfy, anything that satisfied them satisfied you, is that correct? A. Yes, sir.

* * * * * *

(537) Q. I suppose the same thing happened every day while the work was going on that you would talk with the

Army men about whether some insulation or installation was proper or all right or not, wouldn't you? A. Well, Mr. Evans, I would like, if you don't mind—I don't want to make a speech—

Q. Go ahead. A. I had very little to do with the aerial distribution. I am not trying to avoid responsibility in any way, but I had quite a few men under me, under my command blazing the trial and providing temporary light and power, and what not, for construction in that (538) camp. And my job was to get the camp going as far as electricity was concerned for temporary use.

Q. Now Mr. Davies, here is all I am asking. Did you from time to time, not just on the final inspection, but from time to time, talk over with the Army men whether some insulation was all right or not? A. It wasn't necessary.

Q. Did you ever, not whether it was necessary? A. I don't remember.

Q. You don't remember? A. No.

Mr. Evans: I think that is all.

Re-direct Examination by Mr. D'Agosto:

Q. Mr. Davies, of course, throughout your duties you were the representative of Cauldwell-Wingate and Poirer & McLane in the field, wern't you? A. That is right.

Q. And you were the only representative in the field as far as the general contractors were concerned, weren't you?

Mr. Evans: I am going to object to that. He mentioned Friday two or three others.

Mr. D'Agosto: What others?

Mr. Evans: Assistants in certain lines.

Mr. D'Agosto: Let us have them.

Mr. Evans: Didn't he?

Q. Let us have them. Who else besides yourself? (539) A. Warren Fay, a surveyor, Dan Boskett, a tree surgeon —Dan Boskett would have about ten men; Warren Fay would probably have two or three assistants.

Q. But they were all your immediate subordinates, weren't they? A. That is right.

Q. You were the top man for Cauldwell in the field, weren't you? A. The electrical end, yes.

Q. On the electrical end? A. Yes.

Q. And that embraced the outside aerial electrical distribution system, didn't it? A. That is right.

* * * * * *

(547) Q. Did you know Mr. Curley, Mr. Davies? A. I met him.

Q. Where did you meet him? A. At the camp.

Q. Who was he? A. I believe he was the general foreman for Port Chester over the line construction men.

Q. Did you give any orders as to the manner in which he was to stretch the high tension wires over poles 1426, 1427 and 776? A. No.

Q. Do you know whether any employee of Cauldwell-Wingate or Poirer & McLane gave him any instructions as to the manner in which those high tension lines were to be strung along those three poles?

Mr. Mansdorf: Objected to.

The Court: He was asked whether he knew whether any employee—he can answer yes or no whether he knew.

Mr. Mansdorf: That is correct.

A. No.

Q. No what? A. No one from—

Excerpts of Testimony of Richard Davies.

The Court: Strike out the answer. Tell us yes or no, do you know whether any employee of Cauldwell-Wingate ever gave anybody any instructions?

The Witness: I do not know.

(555) Q. Well, did you or any employee of the defendants Cauldwell-Wingate and Poirer & McLane—the general contractors is all I am talking about now—did you or any of your immediate subordinates make an inspection as to the manner in which the defendant Port Chester erected the outside aerial electrical distribution system at Camp Shanks? A. No.

* * * * * *

(565) Q. Mr. Davies, do you remember the last question Mr. D'Agosto asked? A. I don't.

Q. I will remind you what it was: whether you or anybody else on behalf of Cauldwell-Wingate ever made any inspection of the manner in which the work was done by Port Chester; something along those lines; do you remember that? A. That is right.

Q. And you said no, do you remember that? A. That is right.

Q. I am going to call your attention to the testimony you gave on the other trial at folio 1009, page 337: "Q. Did you inspect the wires or the outside electrical distribution system? A. Yes, I made a periodical inspection.

"Q. Will you please tell us what those periodical inspections consisted of? A. I was concerned with the installation of the new work only primarily." This was new work, wasn't it? A. Yes.

Q. "Q. Yes. A. I went up to make sure that the pole lines had been installed, that is, the new installation, to establish that we had proper clearance for sewage, drains, building clearance, street clearance, and things of that sort." A. That is right.

Excerpts of Testimony of Richard Davies.

(566) Q. "I was really concerned about the new installations; I was not concerned about the old," and so on.

Mr. D'Agosto: No. Go on, finish it.

Mr. Evans: All right.

Q. "about the old, or the stuff that the Government had bought from the Rockland Light & Power Company." Now, you did make that kind of inspections periodically, didn't you? A. That is right.

Q. And that was to see how the work was done, not to see how much would be paid for it, isn't that so? A. No, it wasn't to see how it was done. It was to establish clearance. We were concerned about clearances between trees.

Q. You were concerned about other clearances beside trees and buildings and things of that sort, weren't you? A. No. At the time of construction it was my job to give Port Chester as much help as possible to get the roads cleared, have the brush removed, rocks, boulders.

Q. But you were concerned about other clearances, such as the clearances of the wires, weren't you? A. No, I wasn't concerned.

Q. Not at all? A. No, they had qualified men as far as I knew. It wasn't necessary for me to follow that up. They had a general foreman.

(567) Q. You said this bulldog followed it up? A. The Government man.

* * * * * *

BRIEF FOR THE RESPONDENTS IN OPPOSITION

FILED
MAY 11 195
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1950
No. 729

CAULDWELL-WINGATE COMPANY and POIRIER & McLANE CORPORATION,

Petitioners, Defendants Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent, Plaintiff Below,

PORT CHESTER ELECTRICAL CONSTRUCTION COMPANY,

Respondent, Defendant Below.

BRIEF OF RESPONDENT, MARY E. PERSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF WILLIAM S. PERSON, DECEASED, IN OPPOSITION

LOUIS A. D'AGOSTO,
Counsel for Respondent.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
49

INDEX

PAGE

STATEMENT 1

ARGUMENT 3

POINT I—Certiorari at bar was denied by this Court, November 21, 1949, *Cauldwell-Wingate Co., et al.* v. *Person,* 338 U. S. 886 8

POINT II—No question involving the constitution or the validity of any statute was ever raised in the case at bar 8

POINT III—The Supreme Court does not grant certiorari to the Circuit Court of Appeals to review evidence and to discuss specific facts. See *U. S.* v. *Johnston,* 268 U. S. 220 9

POINT IV—The petitioners do not present any substantial question requiring review by this Court 9

POINT V—It is not within the spirit of the Seventh Amendment to disturb a jury verdict on insubstantial grounds 10

CONCLUSION 10

Table of Cases Cited

Bellavance v. Frank Morrow Co., 141 Fed. (2nd) 378, Certiorari denied, 322 U. S. 742 9

Berry v. United States, 312 U. S. 450 4

Braun v. Buffalo General Electric, 200 N. Y. 484 3

Buell v. Utica Gas & Electric Co., 259 N. Y. 443 3

Burrows v. Livingstone Niagara Power Co., 217 A. D. 206, aff'd 244 N. Y. 548 3

Caglione v. Mt. Morris Electric Light Co., 56 A. D. 191 3

PAGE

Campo v. Scofield, 301 N. Y. 468 ..... 6, 7
Carlock v. Westchester Lighting Co., 268 N. Y. 345 .. 4
Cauldwell-Wingate Co., et al. v. Person, 338 U. S. 886 8
City of New York v. Penn Steel Co., 206 Fed. 454 7
Chicago, Milwaukee & St. Paul R. Co. v. Coogan, 271 U. S. 472 4

DeHaen v. Rockwood Sprinkler Co., 258 N. Y. 350 3
Devlin v. Smith, 89 N. Y. 470 7

Engel v. Eureka Club, 137 N. Y. 100 4
Erie R. R. Co. v. Tompkins, 304 U. S. 64 ..... 4, 9

Ferrari v. N. Y. C. R. R. Co., 244 A. D. 182, aff'd 250, N. Y. 527 3
Ford v. Sturgis, 14 Fed. (2nd) 253 7
Fox v. Western N. Y. Motor Lines, Inc., et al., 232 A. D. 308, aff'd 257 N. Y. 305 5

Gelkon Realty Corporation v. Young Women's Hebrew Association, 296 U. S. 537 8
Godchaux Co. v. Estopinal, 251 U. S. 179 8
Gulf M. & N. R. Co. v. Wells, 275 U. S. 455 4
Gunning v. Cooley, 281 U. S. 90 4

Hanley v. Central Savings Bank, 255 A. D. 542, aff'd 280 N. Y. 734 4
Hartford Accident & Indemnity Co. v. Murphy, 158 Fed. (2nd) 506 10

Keller v. Brooklyn Bus Corp., 128 Fed. (2nd) 510 10
Kuhn v. P. J. Carlin Construction Co., 154 Misc. 892 .. 4

Lumbra v. U. S., 290 U. S. 552 4

MacPherson v. Buick Motor Co., 217 N. Y. 382 ..... 3, 7
McArthur v. U. S., 315 U. S. 787 9
Monument Pottery Co. v. Imperial Coal Corp., 21 Fed. (2nd) 683, Certiorari denied, 276 U. S. 618 10
Morhard v. Richmond Light & R. R. Co., 111 A. D. 353.. 3

PAGE

Pally, et al. v. F. W. Woolworth & Co., et al., 194 Misc. 211 5
Palmer v. Hoffman, 318 U. S. 109 10
Person v. Cauldwell-Wingate Co., et al., 176 Fed. (2nd) 237 .....2, 3, 4
Person v. Cauldwell-Wingate Co., et al. (opinion not yet reported, R. 619a) 4, 8
Procopowicz v. 11 West 42nd St., 289 N. Y. 350 3

Regan v. 825th St. Corp., 287 N. Y. 179 3
Rohlfs v. Weil, 271 N. Y. 444 4
Rooker v. Fidelity Trust Company, 261 U. S. 1114 8
Rosebrock v. General Electric Co., 236 N. Y. 227 7

Schroeder v. City & County Savings Bank of Albany, et al., 267 A. D. 206 5
Seamanchuck v. 5th Ave. and 37th St. Corp., 290 N. Y. 412 4
Statler v. George A. Ray Mfg. Co., 195 N. Y. 478 ..... 3, 7
St. Louis and San Francisco Railroad Co. v. Sheperd, 240 U. S. 240 8

Thomas v. Winchester, 6 N. Y. 397 3
Torgensen v. Schultz, 192 N. Y. 156 7

U. S. v. Johnston, 268 U. S. 220 9
U. S. v. Socony Vacuum Co., 310 U. S. 150 9

Van Leet v. Kilmer, 252 N. Y. 454 3

Walters v. Rao Electrical Co., 289 N. Y. 507 4
Ward v. Iroquois Gas Corp., et al., 233 A. D. 127, aff'd 258 N. Y. 124 5
Webster v. Richmond Light & Railroad Co., 158 A. D. 210 3
Wilks v. N. Y. Telephone Co., 243 N. Y. 351 3

Zucht v. King, 260 U. S. 174 9

Statutes

Sec. 130 Decedent Estate Law of New York 1
Sec. 211a, Civil Practice Act 5

Supreme Court of the United States

October Term, 1950

No. 729

CAULDWELL-WINGATE COMPANY and POIRIER & McLANE CORPORATION,

Petitioners, Defendants Below,

against

MARY E. PERSON, as Administratrix of the Goods, Chattels and Credits of WILLIAM S. PERSON, Deceased,

Respondent, Plaintiff Below,

PORT CHESTER ELECTRICAL CONSTRUCTION COMPANY,

Respondent, Defendant Below.

BRIEF OF RESPONDENT, MARY E. PERSON, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF WILLIAM S. PERSON, DECEASED, IN OPPOSITION

Statement

This action was brought by Mary E. Person, on behalf of herself and four dependent children, to recover damages for the wrongful death of her husband, pursuant to Section 130 of the Decedent Estate Law of New York (R. 4a-9a).

There were two Jury trials. The first resulted in a dismissal of the plaintiff's complaint and a directed verdict

on the defendants' motion on December 2, 1948 (R. 412-416).*

On Appeal, the United States Court of Appeals for the Second Circuit reversed and ordered a new trial as to all three defendants. *Person* v. *Cauldwell-Wingate Co., et al.*, 176 Fed. (2nd) 237. Reargument denied July 25, 1949.

Certiorari was denied by this Court November 21, 1949, *Cauldwell-Wingate Co., et al.* v. *Person,* 338 U. S. 886.

The second Jury trial began April 20th, 1950 and resulted in a verdict on May 26th, 1950 in favor of the widow, Mary E. Person, and her four infant children against all defendants for the sum of $90,000.00 (R. 363a).

Motions by the defendants to set aside the verdict and for a new trial were denied by the Trial Judge, July 5, 1950 (R. 364a, 365a).

The defendants appealed to the United States Court of Appeals (R. 366a, 367a). On March 14th, 1951, that Court affirmed as to the respondents Cauldwell-Wingate Company, Inc. and Poirier & McLane Corporation and ordered a new trial as to the respondent Port Chester Electrical Construction Corp. (R. 619a- 628a).

The respondents Cauldwell-Wingate Company, Inc. and Poirier & McLane Corporation then petitioned the United States Court of Appeals for a rehearing which was denied on April 2, 1951 (R. 631a).

---

* (Denotes first record filed in this Court November 25, 1949, No. 411.)

Argument

1. This case involves the original negligent Construction and supervision of high voltage electric wires charged with a deadly current of 2300 volts. This work is in the category of inherently dangerous instrumentalities according to New York Law. See *Person* v. *Cauldwell-Wingate Co. et al.,* 176 F. (2nd) 237, Certiorari denied, *Cauldwell-Wingate Co.* v. *Person,* 338 U. S. 886; *Van Leet* v. *Kilmer,* 252 N. Y. 454; *Morhard* v. *Richmond Light & R. R. Co.,* 111 A. D. 353; *Webster* v. *Richmond Light & Railroad Co.,* 158 A. D. 210; *Buell* v. *Utica Gas & Electric Co.,* 259 N. Y. 443; *Braun* v. *Buffalo General Electric,* 200 N. Y. 484; *Caglione* v. *Mt. Morris Electric Light Co.,* 56 A. D. 191; *Ferrari* v. *N. Y. C. R. R. Co.,* 244 A. D. 182, aff'd 250 N. Y. 527; *Burrows* v. *Livingstone Niagara Power Co.,* 217 A. D. 206, aff'd 244 N. Y. 548.

2. Responsibility in such cases cannot be evaded by the contention that the parties sought to be charged therewith were not in control of the instrumentality at the time of the accident. See *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382; *Thomas* v. *Winchester,* 6 N. Y. 397; *Statler* v. *Ray Mfg. Co.,* 195 N. Y. 478; *Procopowicz* v. *11 West 42nd St.,* 289 N. Y. 350; *Regan* v. *825th St. Corp.,* 287 N. Y. 179; *DeHaen* v. *Rockwood Sprinkler Co.,* 258 N. Y. 350; *Wilks* v. *N. Y. Telephone Co.,* 243 N. Y. 351.

3. The petitioners Cauldwell-Wingate and Poirier & McLane were general contractors. The work involved high voltage lines which are definitely inherently dangerous instrumentalities. The contractors cannot escape responsibility in such cases in New York. The duty to see to it that the work is performed properly and to inspect and supervise it cannot be delegated by the general contractors to others. It is a non-delegable duty. See *Person* v. *Cauldwell-Wingate Co., et al.,* 176 F. (2nd) 237, Certiorari

denied, *Cauldwell-Wingate Co., et al.* v. *Person,* 338 U. S. 886; *Engel* v. *Eureka Club,* 137 N. Y. 100; *Rohlfs* v. *Weil,* 271 N. Y. 444; *Hanley* v. *Central Savings Bank,* 255 A. D. 542, aff'd 280 N. Y. 734; *Kuhn* v. *P. J. Carlin Construction Co.,* 154 Misc. 892; *Walters* v. *Rao Electrical Co.,* 289 N. Y. 507; *Semanchuck* v. *5th Ave. and 37th St. Corp.,* 290 N. Y. 412.

4. According to New York Law, it is no excuse to contend that some cause intervened. The test is whether the intervening cause increased the risk or merely continued the danger which existed in the defendants' original work. See *Person* v. *Cauldwell-Wingate Co., et al.,* 176 F. (2nd) 237, Certiorari denied, *Cauldwell-Wingate Co., et al.* v. *Person,* 338 U. S. 886; *Person* v. *Cauldwell-Wingate Co., et al.* (R. 619a, opinion not yet reported); *Carlock* v. *Westchester Lighting Co.,* 268 N. Y. 345, page 350:

> "Where harmful consequences are brought about by intervening and independent forces the operation of which might have been reasonably foreseen, there is no break in the chain of causation of such character as to relieve the actor from liability. This is so even though they are deliberate and independent, but innocent acts of a human being."

5. The United States Court of Appeals applied New York Law in the case at bar according to the doctrine of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.

6. There were clearly triable issues of fact from which a Jury could reach and did reach the conclusion that the petitioners were guilty of negligence and that plaintiff's intestate was free from contributory negligence. See *Berry* v. *United States,* 312 U. S. 450; *Lumbra* v. *U. S.* 290 U. S. 552; *Gunning* v. *Cooley,* 281 U. S. 90; *Gulf M. & N. R. Co.* v. *Wells,* 275 U. S. 455; *Chicago, Milwaukee & St. Paul R. Co.* v. *Coogan,* 271 U. S. 472.

7. The petitioners' Cauldwell-Wingate Co., Inc. and Poirier & McLane Corp. cannot be heard to complain that they have been made wholly liable for the judgment rendered in favor of the widow and her four children herein for the following reasons:

a. At the conclusion of the trial, the petitioners Cauldwell-Wingate and Poirier & McLane tacitly consented to a dismissal of their cross-claim against their co-defendant and subcontractor, Port Chester. They deliberately remained silent when Port Chester moved for a dismissal of Cauldwell-Wingate and Poirier & McLane's cross-claim. The entire record does not contain a single work of protest or opposition by Cauldwell-Wingate and Poirier & McLane against Port Chester when Port Chester moved for a dismissal of the cross-claim. Hence, they are deemed to have consented thereto.

b. In any event, according to New York Law, the question of joint contribution as between tort feasors is academic. The rights of the widow and four children are paramount and cannot be delayed, interferred with or put in jeopardy by any claim of contribution by one tort feasor as against the other upon the theory that the one is seeking contribution from the other. Section 211a of the Civil Practice Act was never intended to nor does it affect the rights of the plaintiff in any manner. See *Fox* v. *Western N. Y. Motor Lines, Inc., et al.*, 232 A. D. 308; aff'd 257 N. Y. 305; *Ward* v. *Iroquois Gas Corp., et al.*, 233 A. D. 127, aff'd 258 N. Y. 124; *Pally, et al.* v. *F. W. Woolworth & Co., et al.*, 194 Misc. 211; *Schroeder* v. *City & County Savings Bank of Albany, et al.*, 267 A. D. 206, at 211:

> "This plaintiff, nearly six years after the accident, should not be required to suffer further delay which would almost amount to a denial of justice to straighten out complicated issues that may exist between the defendants and concerning which no proof was offered upon the trial."

The widow and her four children at bar have waited five years for a Jury verdict which was obtained after two arduous and expensive Jury Trials, two appeals in the United States Court of Appeals, two reargurnents which were denied by that Appellate Court and one Petition for Certiorari which was denied these petitioners by this Court in *Cauldwell-Wingate Co., et al.* v. *Person,* 338 U. S. 886

To delay this case any longer would be tantamount to a denial of justice.

8. *Campo* v. *Scofield,* 301 N. Y. 468, urged by petitioners p. 7 of their brief, is not applicable for the following reasons:

a. It deals with an entirely different class of cases, which among other things, presuppose well built machines in the first instance which are so constructed as to scream out notice to the world of obvious danger, e.g. a well built exposed set of rollers; a well built exposed buzz saw; a well built exposed airplane propeller.

b. The facts at bar are entirely different from those in the *Campo* case. The deceased was not working on the high tension wires. They were four feet above. He was about to work on a harmless, insulated 110 volt low tension wire, four feet below (R. 69a, 71a, 440a, 441a, 554a, 572a). He touched a guyline which is an innocent looking piece of cable used merely to support a pole against lateral thrusts. It was never intended to carry any electric current let alone a death dealing charge (R. 371a, 377a, 385a, 482a). He touched the guyline at a point about seven feet three inches below the high tension wires (R. 547a, 548a, 559a, 560a). This is a long distance from the death dealing bare "jumper" wire which was charged with 2300 volts of electricity and had energized the guyline below. No lineman could anticipate that the "jumper" would come down like the jaw of a trap to energize the guyline to a point

seven feet three inches below and kill him (R. 69a, 71a, 72a, 73a, 559a, 560a).

c. The *Campo* case, *supra,* in no way affects the doctrine of *MacPherson* v. *Buick Motor Co.,* 217 N. Y. 382. *Rosebrock* v. *General Electric Co.,* 236 N. Y. 227 (electric transformers, improperly packed) affirms *MacPherson* v. *Buick Motor Co., supra* (defective automobile wheel); *Statler* v. *George A. Ray Mfg. Co.,* 195 N. Y. 478 (imperfectly manufactured coffee urn); *Torgesen* v. *Schultz,* 192 N. Y. 156 (defective aerated water bottle); *Devlin* v. *Smith,* 89 N. Y. 470 (imperfectly constructed scaffold).

9. Davies was an electrical construction engineer. He so testified at the first trial (R. 33).* He so testified at the second trial (R. 55a). He was "the top man for Cauldwell-Wingate in the field". Laschiver, the Army representative, "would come to" him (R. 422a). Davies "would have to pass it on to Port Chester" (R. 422a). Laschiver stated that it was Davies, the representative of Cauldwell-Wingate and Poirier & McLane, who "thought it would be better" to deadend wires when crossing roads and that he, Davies "convinced Laschiver" "that it was the proper thing to do" and Laschiver "adopted it" (R. 505a). Deadending wires to a pole requires the erection of a "jumper" to force the current around the pole.

The evidence was substantial that this type of construction was unsafe, improper and dangerous (R. 164a-167a, 596a, 597a). This type of construction was the proximate cause of the decedent's death and the Jury so found.

10. *Ford* v. *Sturgis,* 14 F. (2nd) 253, (pet. 22) deals with the collapse of a ceiling in a theatre in the City of Washington. It is not New York Law. *City of New York* v. *Penn Steel Co.,* 206 F. 454 (pet. 22), is a contract action and has no application.

POINT I

Certiorari at bar was denied by this Court, November 21, 1949, *Cauldwell-Wingate Co., et al.* v. *Person*, 338 U. S. 886.

POINT II

No question involving the constitution or the validity of any statute was ever raised in the case at bar.

No one ever raised any constitutional question or any question affecting the validity of any statute either on the first trial, the first appeal, the first petition for a rehearing or the first petition for a Writ of Certiorari which was before this Court November 21, 1949, *Cauldwell-Wingate Co., et al.* v. *Person,* 338 U. S. 886. None was raised upon the second trial or upon the second appeal, *Person* v. *Cauldwell-Wingate Co., et al.* (R. 619a, case not yet reported).

For the first time on the 28th day of March, 1951, in a petition for a rehearing, these petitioners advanced the argument that a constitutional question was involved. Rehearing denied April 2, 1951 (R. 631a-642a). The attempt to raise a constitutional question on a motion for rehearing is without merit and in any event, too late. See *Gelkon Realty Corporation* v. *Young Women's Hebrew Association,* 296 U. S. 537; *Rooker* v. *Fidelity Trust Company,* 261 U. S. 1114; *Godchaux Co.* v. *Estopinal,* 251 U. S. 179; *St. Louis and San Francisco Railroad Co.* v. *Sheperd,* 240 U. S. 240.

This is a simple negligence action in which a young man, 32 years of age, lost his life and left him surviving a widow and four infant children, one of whom was born posthumously and all of whom were deprived of his sup-

port, maintenance, care and nurture (R. 428a-435a) due solely to the carelessness and negligence of the defendants, as found by a Jury on the 26th day of May, 1950 (R. 348a). The Trial Court and the Appellate Court applied New York Law in accordance with the doctrine of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.

The Seventh Amendment guarantees the right to one trial by Jury not three, as these petitioners would seem to contend.

POINT III

The Supreme Court does not grant certiorari to the Circuit Court of Appeals to review evidence and to discuss specific facts. See *U. S.* v. *Johnston,* 268 U. S. 220.

POINT IV

The petitioners do not present any substantial question requiring review by this Court.

This case does not involve any conflict between Circuit Courts of Appeal, any conflict with any applicable local decisions, any important question of Federal Law or any question of great public import. It is a simple negligence suit between private parties involving purely local law. See *Bellavance* v. *Frank Morrow Co.,* 141 F. (2nd) 378; Certiorari denied, 322 U. S. 742; *McArthur* v. *U. S.,* 315 U. S. 787; *U. S.* v. *Socony Vacuum Co.,* 310 U. S. 150; *Zucht* v. *King,* 260 U. S. 174.

POINT V

It is not within the spirit of the Seventh Amendment to disturb a jury verdict on insubstantial grounds.

The Trial Court did not deprive these petitioners of their right to trial by Jury, nor did the United States Court of Appeals interfere therewith when it affirmed the verdict. See *Hartford Accident & Indemnity Co.* v. *Murphy*, 158 F. (2nd) 506; *Keller* v. *Brooklyn Bus Corp.*, 128 F. (2nd) 510; *Monument Pottery Co.* v. *Imperial Coal Corp.*, 21 F. (2nd) 683, Certiorari denied, 276 U. S. 618; *Palmer* v. *Hoffman*, 318 U. S. 109.

CONCLUSION

The petition for a Writ of Certiorari presents no question requiring further review by this Court. It is, therefore, respectfully submitted that the same should be denied.

Louis A. D'Agosto,
Counsel for Respondent.